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SUPREME COURT  
OF THE STATE OF WASHINGTON

KATHIE COSTANICH,

Petitioner,

vs.

STATE OF WASHINGTON, DSHS

Respondent.

SUPPLEMENTAL BRIEF OF PETITIONER

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& GOODFRIEND, P.S.

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## **I. ISSUES PRESENTED FOR REVIEW**

1. The express purpose of the Washington Equal Access to Justice Act is to reimburse parties who find themselves forced to incur substantial expenses "in securing the vindication of their rights in administrative proceedings." Should the \$25,000 fee limit in RCW 4.84.350 be interpreted to apply to each level of "judicial review of an agency action"?

2. Did the Court of Appeals violate RAP 18.8(b) by allowing the State to invoke the fee limit of RCW 4.84.350 in a motion to modify filed after the time for a motion for reconsideration of the court's award of fees had passed?

## **II. STATEMENT OF THE CASE**

### **A. DSHS Unsuccessfully Appealed The Superior Court's Decision That It Was Not Substantial Justified In Revoking Petitioner's Foster Care License.**

The following background is taken from the Court of Appeals' published decision:

Kathie Costanich and her husband Ken were foster parents devoted to caring for some of the neediest and most difficult foster children in the system. Costanich's foster home received accolades from the State. However, she also regularly used profanity, sometimes swearing around her foster children. The

Department of Social and Health Services (DSHS) found that Costanich's language was emotionally abusive and revoked her foster care license. 138 Wn. App. at 551-52, ¶ 1.

Costanich appealed both the finding of abuse and the revocation of her license in an administrative hearing. The Administrative Law Judge (ALJ) overturned DSHS's decision, finding that the children had not been emotionally abused and were, in fact, "thriving," based on their therapists' and social workers' testimony. 138 Wn. App. at 553, ¶ 4.

DSHS appealed this decision to the DSHS Board of Appeals. The review judge reversed the ALJ's initial decision. He found there was substantial evidence that Costanich had threatened and swore at the children in her home. Substituting his own view of the evidence for that of the ALJ based primarily on the hearing testimony and reports of the Child Protective Services investigator, the review judge concluded this constituted emotional abuse and justified revoking her license. 138 Wn. App. at 553, ¶¶ 4, 1.

Costanich sought judicial review. The superior court reversed the review judge's final administrative decision. The superior court awarded Costanich attorney fees under the Equal

Access to Justice Act (EAJA), RCW 4.84.350, of \$25,000 – the limit under the statute for “judicial review of an agency action.” 138 Wn. App. at 553, ¶ 4.

DSHS appealed the superior court’s decision to Division One. The appellate court affirmed the superior court’s decision, including its award of attorney fees. 138 Wn. App. at 564, ¶ 24. Division One held that that DSHS was “not substantially justified” in revoking Costanich’s foster care license. 138 Wn. App. at 564, ¶ 23. Division One awarded attorney fees to Costanich for the fees incurred on appeal, holding that she was “entitled to attorney fees on appeal” under RCW 4.84.350 and RAP 18.1. 138 Wn. App. at 564, ¶¶ 24, 25.

**B. DSHS First Raised The “Statutory Cap” In A Motion To Modify A Commissioner’s Order Establishing The Amount Of Fees.**

The following procedural history is reflected in the Court of Appeals record:

Division One’s initial decision, which reversed the superior court’s award of fees and did not address appellate attorney fees, was filed on January 29, 2007. Petitioner timely filed a motion for reconsideration asking the court to reinstate the fees awarded below and requesting appellate attorney fees under RCW 4.84.350.

The appellate court called for an answer to the motion for reconsideration. The State's sole argument on reconsideration was that DSHS's appeal was "substantially justified" and that an appellate fee award was therefore not warranted. Even though it was fully aware of the attorney fees that had already been awarded to petitioner in the superior court, the State never raised any issue of a "statutory cap" on fees.

On May 3, 2007, Division One reconsidered its decision, reinstated the fee award below, and awarded appellate fees to petitioner, because "although DSHS was justified initially in its concerns about Costanich's use of profanity, the evidence before the ALJ shows that DSHS was not substantially justified in revoking her license once it became aware of the problems with Duron's investigation." *Costanich*, 138 Wn. App. at 564, ¶ 26.

The State did not seek reconsideration of this decision under RAP 12.4(h). Nor did the State seek review of Division One's published decision in this Court pursuant to RAP 13.4.

Petitioner timely submitted her fee affidavit in the Court of Appeals, requesting fees totaling \$46,239 and costs of \$198. Again the State did not object to the award or amount of appellate fees requested within the time allowed under RAP 18.1(e). On June 22,



2007, Commissioner Mary Neel found that “[g]iven the length of the record and the extent of the matters litigated in this court, the time spent is reasonable and relates to this appeal,” and awarded all the fees and costs requested by Costanich.

On July 12, 2007, in a motion to modify the commissioner’s ruling, the State for the first time argued that an award of appellate fees was barred by the “statutory cap” in RCW 4.84.350 because petitioner had been awarded \$25,000 in fees by the superior court. The State did not move for reconsideration of the award of fees on May 3, 2007. Nor did the State ask the appellate court to extend the time to move for reconsideration pursuant to RAP 18.8(b).

On October 12, 2007, the panel that originally awarded attorney fees to Costanich granted DSHS’ motion to modify the commissioner’s ruling. The panel imposed \$1,000 in sanctions against DSHS “because appellant made its argument based on the \$25,000 fee limitation contained in RCW 4.84.350(2) for the first time in its motion to modify” but denied petitioner any attorney fees on appeal.

This Court granted review of the Court of Appeals decision denying attorney fees to the petitioner at the appellate court level.

### III. ARGUMENT

#### A. A Plain Reading Of RCW 4.84.350 Entitles A Qualified Party To Attorney Fees At Each Level Of Judicial Review.

RCW 4.84.350, which was enacted as part of the Equal Access to Justice Act, entitles a "qualified party that prevails in a judicial review of an agency action" to reasonable attorneys' fees "unless the court finds that the agency action was substantially justified:"

[A] court shall award a qualified party that prevails in a judicial review of an agency action fees and other expenses, including attorneys' fees, unless the court finds that the agency action was substantially justified or that circumstances make an award unjust.

RCW 4.84.350(1). The statute caps the attorney fees award to \$25,000. RCW 4.84.350(2) ("[t]he amount awarded a qualified party under subsection (1) . . . shall not exceed twenty-five thousand dollars").

The Equal Access to Justice Act was enacted in 1995. The intent, as expressed by the legislature, was to ensure that parties have an opportunity to defend themselves from unreasonable agency actions by allowing them an award of fees if they prevail:

The legislature finds that certain individuals, smaller partnerships, smaller corporations, and other organizations may be deterred from seeking review of or defending against an unreasonable agency action

because of the expense involved in securing the vindication of their rights in administrative proceedings. The legislature further finds that because of the greater resources and expertise of the state of Washington, individuals, smaller partnerships, smaller corporations, and other organizations are often deterred from seeking review of or defending against state agency actions because of the costs for attorneys, expert witnesses, and other costs. The legislature therefore adopts this equal access to justice act to ensure that these parties have a greater opportunity to defend themselves from inappropriate state agency actions and to protect their rights.

Laws 1995, ch. 403 § 901 (legislative findings).

The plain language of the EAJA does not limit attorney fees on appeal. The Act uses the phrase “judicial review of an agency decision” to trigger the right to fees. “Judicial review” means a judicial review as defined by chapter 34.05 RCW,” the Administrative Procedure Act (“APA”). RCW 4.84.340(4).

Under the APA, “judicial review” is a specific event, the initial review of an agency decision, RCW 34.05.570, which must be initiated by petition in superior court. RCW 34.05.524. The APA separately provides for “appellate review” of the superior court decision on judicial review under another statute, RCW 34.05.526.

These statutes must be read in harmony, and the specific definitions in the APA govern. *Constanich*, 138 Wn. App. at 563-64, ¶ 22. “[S]tatutes are to be interpreted as they are plainly

written, unless a literal reading would contravene legislative intent by leading to strained or absurd results.” *Marine Power & Equipment Co., Inc. v. Industrial Indem. Co.*, 102 Wn.2d 457, 461, 687 P.2d 202 (1984). Because attorney fees for judicial review in the superior court are authorized by RCW 4.84.350, a prevailing party on appellate review of the superior court decision is necessarily entitled to attorney fees on appeal. *Ur-Rahman v. Changchun Dev., Ltd.*, 84 Wn. App. 569, 576, 928 P.2d 1149 (1997) (“If a statute authorizes attorneys fees in the trial court, we have the inherent jurisdiction to make such an award on appeal.”).

The plain language of the EAJA also does not limit attorney fees to \$25,000 for all stages of review. The statute provides that “a court shall award a qualified party that prevails in a judicial review of an agency action fees and other expenses.” RCW 4.84.350 (emphasis added). “A” is defined as “each; every; per” Webster’s New Universal Unabridged Dictionary (1996). A “plain reading” of the statutes, consistent with the legislative intent, is that a party is entitled to attorney fees at *each* stage of review.

Capping a qualified prevailing party’s fees to \$25,000 over *all* levels of review would, as in this case, allow an agency to pursue an unjustified position at successive levels of review with no

consequence if the prevailing party has already received the statutory limit for judicial review in the superior court. The parties who prevail in the superior court would be deterred from defending against an appeal because of the additional attorney fees they will be forced to incur on appeal but would have no ability to recoup. In this case, for instance, petitioner, a foster parent who prevailed against DSHS at the administrative fact-finding hearing and at superior court, would still face a finding of abuse if she could not afford to defend again in the Court of Appeals.

This is contrary to the legislative intent behind the Equal Access to Justice Act, which was to avoid having parties “deterred from seeking review of or defending against an unreasonable agency action because of the expense involved in securing the vindication of their rights in administrative proceedings.” Laws 1995, ch. 403 § 901 (legislative findings). The statute itself can and should be read in a manner that allows an award for each level of review, as it speaks in terms of “a court’s” assessment of an agency’s justification for acting. RCW 4.84.350(1). As the Court of Appeals itself recognized in affirming the fee award in the superior court, *Costanich*, 138 Wn. App. at 564, ¶ 23, this is a determination that may be different in the superior and appellate

courts, and that as a matter of policy requires that each level of review be subject to a fee award.

In resisting review, the State claimed that this interpretation will lead to an “absurd result” because a party could collect fees if she prevailed in the superior court but lost in the appellate court. This argument is without merit. If on appeal the superior court is reversed, and the appellate court determines that the respondent is not the prevailing party, the attorney fees awarded under RCW 4.84.350 will also be reversed. See e.g. *Galvis v. Dept. of Transp.*, 140 Wn. App. 693, 712, ¶ 51, 167 P.3d 584 (2007) (“Because we conclude that the superior court erred in entering judgment on behalf of the property owners, we also reverse its award of fees and costs [under RCW 4.84.350]”); *McFreeze Corp. v. Dept. of Revenue*, 102 Wn. App. 196, 201, 6 P.3d 1187 (2000) (reversing summary judgment order against the Department of Revenue, including the trial court’s award of attorney fees to the respondent). What is more absurd is a reading of the statute that absolves the State from any potential liability for appellate fees if, as in this case, it unsuccessfully appeals a decision for which a party has already received a fee award for judicial review at the superior court level.

The State's reliance on *Alpine Lakes Protection Society v. Dept. of Natural Resources*, 102 Wn. App. 1, 979 P.2d 929 (1999) is also misplaced. The superior court in *Alpine Lakes* had awarded only \$7,500 in fees; the appellate court remanded for, among other things, a determination of whether the citizen organization was entitled to all or only a portion of this award because it had not prevailed on all issues. *Alpine Lakes*, 102 Wn. App. at 20. *Alpine Lakes* did not raise the same issue as this case, where the petitioner was awarded the "statutory cap" in judicial review in the superior court and then fully prevailed on appeal.

The express purpose of the Washington Equal Access to Justice Act is to reimburse parties who find themselves forced to incur substantial expenses in securing the vindication of their rights at all levels of review. This Court should interpret the \$25,000 fee limit in RCW 4.84.350 to apply to each level of judicial review of an agency action.

**B. The Appellate Court's Vacation Of Its Fee Award On The State's Untimely Motion Violated RAP 18.8(b).**

In vacating the commissioner's fee award Division One essentially granted an untimely motion for reconsideration of its previous decision awarding fees. This award of fees otherwise was

final, because the State had not filed a timely motion for reconsideration or petition for review from the appellate court's award of fees. Division One's extension of time to reconsider its substantive award of fees was improper under RAP 18.8(b), which provides that an extension of time for a motion for reconsideration will only be granted in "extraordinary circumstances and to prevent a gross miscarriage of justice."

In *Schaefco, Inc. v. Columbia River Gorge Comm'n*, 121 Wn.2d 366, 368, 849 P.2d 1225 (1993) this Court dismissed an appeal that had been allowed to proceed by the Court of Appeals "given the procedural failures of the case," including failure to timely perfect appeal, without any demonstration of "sound reasons to abandon the preference for finality." In *Schaefco*, the appellant had timely filed but not timely served a motion for reconsideration in the superior court. As a consequence, a notice of appeal filed within 30 days of the decision on reconsideration, but not within 30 days of the underlying final decision, was not timely.

The Court of Appeals nevertheless allowed the appeal to proceed, and then certified it to this Court. Even though the case raised "many important issues, including an equal protection claim," this Court dismissed the appeal, because appellant had "not



provided sufficient excuse for its failure to file a timely notice of appeal, nor has it demonstrated sound reasons to abandon the preference for finality.” **Schaefco**, 121 Wn.2d at 368.

It was too late in this case to object to the substantive award of fees under the EAJA in a motion to modify the commissioner’s determination of the *amount* of fees under RAP 18.1(f). “RAP 18.1 is strictly procedural. It does not address the threshold question of whether a party is entitled to recover attorney fees.” Tegland, 3 Wash. Prac. RAP 18.1, at 410 (6<sup>th</sup> ed. 2004). The determination whether a party is entitled to fees, “made by reference to statutes,” *id.*, is part of the substantive decision on review, and claimed errors in the substantive decision must be addressed on reconsideration. RAP 12.4(c) (“The motion should state with particularity the points of law or fact which the moving party contends the court has overlooked or misapprehended.”).

The stringent standards of RAP 18.8(b) govern extensions of time for notices of appeal and motions for reconsideration equally. The State’s excuse in this case for failing to timely object to the panel’s award of fees by filing a motion for reconsideration reflects the same sort of procedural calendaring deficiencies in the Attorney General’s office that were expressly rejected as a basis for relief

under RAP 18.8(b) in *Beckman v. State*, 102 Wn. App. 687, 11 P.3d 313, *rev. denied*, (2000). RAP 18.8(b) furthers a policy of finality and certainty to judicial decisions by providing that “there should be some point in time at which [the prevailing] party could rely upon the judgment. . . .” Task Force Comment to RAP 18.8, *reprinted in* Tegland, 3 Wash. Prac. 451 . Regardless whether the statutory cap of RCW 4.84.350 would otherwise apply, the original award of fees in the appellate court should stand because the State failed to timely object to an award of fees based on the statute.

#### IV. CONCLUSION

Given the express purpose of the Washington EAJA to reimburse parties who find themselves required to incur substantial expenses “in securing the vindication of their rights in administrative proceedings,” this Court should interpret RCW 4.84.350's \$25,000 limit on fees to apply to each level of “judicial review of an agency action.” Given the State's failure to timely move for reconsideration of the fee award in the appellate court, this Court should reinstate the fee award in Division One. Petitioner is also entitled to her fees and costs in this Court.

Dated this 4th day of April, 2008.

EDWARDS, SIEH, SMITH  
& GOODFRIEND, P.S.

By: 

Catherine W. Smith  
WSBA No. 9542

Attorneys for Petitioner

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The undersigned declares under penalty of perjury, under the  
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Attached for filing in .pdf format is the Supplemental Brief of Petitioner, in *Costanich v. State of Washington*, Cause No. 80874-1. The attorney filing this brief is Catherine W. Smith, WSBA No. 9542, e-mail address: [cate@washingtonappeals.com](mailto:cate@washingtonappeals.com)

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